

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

In consideration of the foregoing, the Federal Aviation Administration corrects the adopted amendment, 14 CFR part 71, by making the following correcting amendment:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389

§ 71.1 [Corrected]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9J, Airspace Designations and Reporting Points, dated August 31, 2001, and effective September 16, 2001, is amended as follows:

Paragraph 5000 Class D Airspace

ASO FL D Eglin AFB, FL [CORRECTED]

Eglin AFB, FL

(Lat. 30°29'00"N, long. 86°31'34"W)

Destin—Fort Walton Beach

(Lat. 30°24'00"N, long. 86°28'17"W)

Destin NDB

(Lat. 30°24'18"N, long. 86°28'26"W)

Duke Field

(Lat. 30°39'07"N, long. 86°31'23"W)

Hurlburt Field

(Lat. 30°25'44"N, long. 86°41'20"W)

That airspace extending upward from the surface, to and including 2,600 feet MSL within a 5.5-mile radius of Eglin AFB and within a 4-mile radius of Destin—Fort Walton Beach Airport and within 2.5 miles each side of the 147° bearing from the Destin NDB, extending 7 miles southeast of the NDB, excluding the portion north of a line connecting the 2 points of intersection within a 5.2-mile radius circle centered on Duke Field; excluding the portion southwest of a line connecting the 2 points of intersection within a 5.3-mile radius of Hurlburt Field; excluding a portion east of a line beginning at lat. 30°30'43"N., long 86°26'21"W., extending north to the 5.5-mile radius and north of a line beginning at lat. 30°30'43"N., long. 86°26'21"W. extending east to the 5.5-mile radius.

* * * * *

Issued in College Park, Georgia, on January 29, 2002.

Wade T. Carpenter,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 02–2721 Filed 2–4–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–45371]

Exemption of Transactions in Certain Options and Futures on Security Indexes From Section 31 of the Exchange Act

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“Commission”) is, by rule, exempting two classes of securities from the fee and assessment requirements of Section 31 of the Securities Exchange Act of 1934 (“Exchange Act”): options on narrow-based security indexes and futures on narrow-based security indexes. In light of the very low amount of Section 31 fees currently collected on options on narrow-based security indexes, the Commission is granting the exemption for options on such indexes to relieve certain national securities exchanges of the burden of having to calculate whether an index is narrow-based or broad-based. The Commission is granting the exemption for futures on narrow-based security indexes to promote a level playing field between options and futures.

EFFECTIVE DATE: February 1, 2002.

FOR FURTHER INFORMATION CONTACT: Michael Gaw, Special Counsel, 202–942–0158, Division of Market Regulation, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549–1001.

SUPPLEMENTARY INFORMATION:

I. Background and Summary

Section 31 of the Exchange Act¹ requires national securities exchanges and national securities associations to pay fees and assessments to the Commission based on sales of or transactions in certain securities. Specifically, a national securities exchange is required to pay to the Commission fees based on the aggregate dollar amount of sales of certain securities transacted on that exchange,² and a national securities association is required to pay to the Commission fees based on the aggregate dollar amount of sales of certain securities transacted by or through any member of the association otherwise than on a national securities exchange.³ In addition, an exchange or association is required to

pay to the Commission an assessment for each round turn transaction on a security future.⁴ Section 31(f) of the Exchange Act⁵ provides that “[t]he Commission, by rule, may exempt any sale of securities or any class of sales of securities from any fee or assessment imposed by [Section 31], if the Commission finds that such exemption is consistent with the public interest, the equal regulation of markets and brokers and dealers, and the development of a national market system.”

On January 16, 2002, President Bush signed into law the Investor and Capital Markets Fee Relief Act (“Fee Relief Act”)⁶ which, among other things, amends Section 31 to provide that “options on securities indexes (excluding a narrow-based security index)” are exempt from the fee requirements of Section 31. Thus, as provided by statute, national securities exchanges and national securities associations are not required to pay to the Commission fees on sales of options on security indexes that are not narrow-based security indexes⁷ (i.e., are “broad-based security indexes”). The exclusion of sales of options on broad-based indexes from Section 31 fees is consistent with the treatment of futures on broad-based indexes, which compete with options on broad-based indexes and are not subject to assessments under Section 31.

The Commission today is amending Rule 31–1 under the Exchange Act⁸ by adding new paragraphs (f) and (g) to exempt options and futures, respectively, on narrow-based security indexes from Section 31. The Commission also is adopting conforming amendments to the preliminary note in Rule 31–1.

II. Discussion

A. Exemption for Options on Narrow-Based Security Indexes

The Exchange Act defines a narrow-based security index to be an index that has any one of the following four characteristics: (1) It has nine or fewer component securities; (2) any one of its component securities comprises more than 30 percent of its weighting; (3) any group of five of its component securities together comprise more than 60 percent of its weighting; or (4) the lowest weighted component securities

⁴ See 15 U.S.C. 78ee(d).

⁵ 15 U.S.C. 78ee(f).

⁶ Pub. L. No. 107–123, 115 Stat. 2390 (2002).

⁷ The term “narrow-based security index” is defined in Section 3(a)(55)(B) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B).

⁸ 17 CFR 240.31–1.

¹ 15 U.S.C. 78ee.

² See 15 U.S.C. 78ee(b).

³ See 15 U.S.C. 78ee(c).

comprising, in the aggregate, 25 percent of the index's weighting have an aggregate dollar value of average daily trading volume of less than \$50 million (or in the case of an index with 15 or more component securities, \$30 million).⁹ This definition was added to the Exchange Act by the Commodity Futures Modernization Act of 2000 which, among other things, authorized the trading of futures on single securities and on narrow-based security indexes.

Trading of futures on narrow-based security indexes is subject to joint regulation by the Commission and the Commodity Futures Trading Commission ("CFTC"), whereas trading of futures on broad-based security indexes is subject to the sole jurisdiction of the CFTC. To ensure that trading of an index future is not subject to one regulatory framework one instant and another regulatory framework the next instant, an index is excluded from the definition of "narrow-based security index" if: (1) a future on such index traded on a CFTC-regulated market for at least 30 days as a future on a broad-based security index; and (2) such index has not had the above characteristics of a narrow-based security index for more than 45 business days over three calendar months.¹⁰ This exclusion, in effect, creates a tolerance period that permits trading in futures on broad-based security indexes to continue to be regulated exclusively by the CFTC if the index becomes narrow-based for 45 or fewer business days in a three-month period.¹¹

This statutory tolerance period applies only when a future is trading on an index. When a future is not trading on an index, the index can switch continuously between a broad-based security index and a narrow-based security index. Thus, when a future is not trading on an index, an option on that index could be an option on a narrow-based security index one instant—and thus be subject to Section 31 fees—and be an option on a broad-based security index—and thus be exempt from Section 31 fees—just an instant later. Exchanges and associations must, therefore, continuously monitor the status of an index underlying an option and pay Section 31 fees to the Commission only

for sales executed when the underlying index was narrow-based.

Currently, the trading volume of options on narrow-based security indexes, and thus the amount of Section 31 fees levied on such trading, is insignificant. The fees paid by the exchanges to the Commission in 2001 for all sales of options on indexes that were, or in the near future might become, narrow-based security indexes was below \$35,000.¹² In light of the currently low dollar volume of sales of options on narrow-based security indexes and the resources that exchanges and associations must devote to monitoring the narrow-based status of the underlying indexes, the Commission believes that it is consistent with the public interest, the equal regulation of markets and brokers and dealers, and the development of a national market system to exempt options on narrow-based security indexes from the fee requirements of Section 31.

To the extent that the dollar volume of sales of options on narrow-based security indexes increases, the Commission may reevaluate its decision today to exempt such products from Section 31 fees.¹³

B. Exemption for Futures on Narrow-Based Security Indexes

In addition, the Commission is exempting futures on narrow-based security indexes from the fee assessment requirements of Section 31. The Commission believes that such an exemption is necessary and appropriate to maintain a level competitive playing field between futures on narrow-based security indexes and options on narrow-based security indexes that compete with one another. The Commission notes that one of the reasons that Congress relieved exchanges and associations from the requirement to pay Section 31 fees on options on security indexes (excluding narrow-based security indexes) is that futures on such indexes are not subject to Section 31 assessments. Similarly, the Commission believes that an exemption for futures on narrow-based security indexes is consistent with the public interest, the equal regulation of markets and brokers and dealers, and the development of a national market system. As with the exemption for

options on narrow-based security indexes, the Commission may reevaluate its decision today to exempt futures on narrow-based security indexes from Section 31 assessments after trading commences in these products.

III. Consideration of the Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act¹⁴ requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act¹⁵ requires the Commission, when promulgating rules under the Exchange Act, to consider the impact any such rules would have on competition. Section 23(a)(2) further provides that the Commission may not adopt a rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The Commission has considered the effect of the amendments to Rule 31–1 on efficiency, competition, and capital formation. The Commission does not believe that these amendments will impose any burden on competition. To the contrary, the Commission believes that the amendments will promote a level playing field between options and futures on narrow-based security indexes.

The Commission also has considered whether exempting options and futures on narrow-based security indexes from Section 31 might divert trading activity from securities that are not exempt from Section 31 to these options and futures that are exempt. However, the Commission views this prospect as highly unlikely. Options and futures on single stocks and options and futures on narrow-based security indexes are, in practice, very imperfect substitutes for each other.¹⁶ Given this imperfection, the very small per-transaction Section 31 fee on transactions in the single-stock options and futures would not likely be the controlling factor in a market participant's decision to purchase index

⁹ See 15 U.S.C. 78c(a)(55)(B)(i)–(iv).

¹⁰ See 15 U.S.C. 78c(a)(55)(C)(iii).

¹¹ If the index becomes narrow-based for more than 45 days over three consecutive calendar months, the Exchange Act then provides an additional grace period of three months during which the index is excluded from the definition of narrow-based security index. See 15 U.S.C. 78c(a)(55)(E).

¹² By contrast, the Commission collected a total of approximately \$1.1 billion in Section 31 fees in the twelve months from September 2000 to August 2001.

¹³ The Commission could consider, for example, adopting rules that establish a tolerance period for security indexes underlying options that is similar to the statutory tolerance period for futures on security indexes. See *supra* notes 10–11 and accompanying text.

¹⁴ 15 U.S.C. 78c(f).

¹⁵ 15 U.S.C. 78w(a)(2).

¹⁶ A market participant would view an option or future on a narrow-based security index as a close substitute for individual options or futures on the component securities only if the market participant desired to have an interest in all of the index's component securities, and in the proportion that such securities were weighted in the index.

options or futures rather than options or futures on the index's component securities.

IV. Administrative Procedure Act and Other Considerations

Section 553(b) of the Administrative Procedure Act ("APA")¹⁷ generally requires an agency to publish notice of a proposed rule making in the **Federal Register**. This requirement does not apply, however, if the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."¹⁸

Although President Bush signed the Fee Relief Act into law on January 16, 2002, it became effective retroactively to December 28, 2001.¹⁹ Thus, in complying with the requirements of Section 31, national securities exchanges and national securities associations currently must continuously monitor whether an index underlying an index option is narrow-based or broad-based. The Commission finds that it is unnecessary and contrary to the public interest to continue to require exchanges and associations to incur this burden and assess the required fees during a notice and comment period when the amount of such fees would be an infinitesimal portion of the total fees collected and paid to the Commission under Section 31. Therefore, the Commission finds good cause to waive the APA's notice and comment provisions with respect to the amendments to Rule 31-1.

The APA also generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective.²⁰ However, this requirement does not apply if the rule grants or recognizes an exemption or relieves a restriction²¹ or if the agency finds good cause not to delay the effective date.²² The Commission finds that the amendments to Rule 31-1 meet both criteria. The amendments exempt two classes of securities—options on narrow-based security indexes and futures on narrow-based security indexes—from the fee assessments of Section 31. Moreover, as discussed above, making the rule amendments effective immediately will spare exchanges and associations the burden and expense of monitoring indexes and

assessing the required fees for the period during which the amendments are not effective. Therefore, the Commission finds good cause to issue the rule amendments without a delayed effective date.

The Regulatory Flexibility Act²³ is not applicable to the promulgation of the rule amendments. The flexibility analysis requirement of the Regulatory Flexibility Act applies only if the Commission would be required by the APA to publish general notice of the proposed rulemaking.²⁴ As discussed above, the Commission has determined that the APA does not require it to solicit public comment in this case.

The Paperwork Reduction Act²⁵ is not applicable to the promulgation of the amendments because they do not impose any collection of information requirements that would require the approval of the Office of Management and Budget.

V. Consideration of Costs and Benefits

A. Costs

Eliminating Section 31 fees for transactions in options or futures on narrow-based indexes theoretically could result in slightly higher fees on transactions in other securities that do not benefit from a Section 31 exemption. The Exchange Act, as amended by the Fee Relief Act, requires the Commission to set rates for Section 31 fees so that such rates are reasonably likely to produce aggregate fee collections that equal amounts prescribed by the Fee Relief Act.²⁶ Thus, although the Commission may exempt certain securities from Section 31, it cannot reduce the total amount of fees that it is required to collect under Section 31. An exemption granted to certain securities could, therefore, result in a higher rate paid on transactions in the remaining, non-exempted securities. However, because the fees collected on trades in options on narrow-based security indexes are very small relative to the overall fees collected on non-exempt securities transactions in the United States,²⁷ the Commission concludes that the amendments to Rule 31-1 adopted today will have a negligible effect, if any, on the fees paid on these other securities transactions.²⁸

Furthermore, the Commission believes that, although futures on narrow-based security indexes have not yet begun trading, the dollar volume of trading in these products will be very small for the foreseeable future. Therefore, the Commission also believes that an exemption for futures on narrow-based security indexes will have a negligible effect, if any, on the fees paid on other securities transactions.

B. Benefits

The benefits of the amendments to Rule 31-1 adopted today will equal the costs saved: (1) By certain national securities exchanges from not having to monitor the indexes underlying options for purposes of Section 31; (2) by certain national securities exchanges from no longer having to collect Section 31 fees from market participants for transactions in options on narrow-based security indexes; and (3) by market participants who effect transactions in options on narrow-based security indexes and who will no longer have to pay Section 31 fees on such transactions.

1. Benefits From Relieving Monitoring Burdens

With the adoption of the amendments to Rule 31-1, all index options and index futures—whether based on narrow-based or broad-based indexes—are now exempt from Section 31 fees. The Commission believes that three national securities exchanges will derive certain benefits from not having to monitor whether an index that underlies an option is narrow-based or broad-based for purposes of Section 31.

In August 2001, the Commission adopted a rule that established a methodology for calculating the market value of a narrow-based security index ("Index Calculation Rule").²⁹ In adopting the Index Calculation Rule, the Commission estimated the costs that would be imposed on national securities exchanges, designated contract markets, derivatives transaction execution facilities, and foreign boards of trade to calculate the market value of security indexes in accordance with the rule. As noted above, the Fee Relief Act excluded from Section 31 options on broad-based security indexes but not options on narrow-based security indexes. Thus, when the Fee Relief Act

collection in fiscal year 2003 under Section 31, as amended by the Fee Relief Act. This amount is so small that it would not affect the fee rate that the Commission is required to publish for fiscal year 2003 pursuant to Section 31. See 15 U.S.C. 78ee.

²⁹ See Securities Exchange Act Release No. 44724 (August 20, 2001), 66 FR 44490 (August 23, 2001) (adopting Rules 3a55-1 to 3a55-3).

¹⁷ 5 U.S.C. 553(b).

¹⁸ 5 U.S.C. 553(b)(B).

¹⁹ See Section 11 of the Fee Relief Act.

²⁰ See 5 U.S.C. 553(d).

²¹ See 5 U.S.C. 553(d)(1).

²² See 5 U.S.C. 553(d)(3).

²³ 5 U.S.C. 601-612.

²⁴ See 5 U.S.C. 603(a).

²⁵ 44 U.S.C. 3501 *et seq.*

²⁶ See 15 U.S.C. 78ee(f).

²⁷ See *supra* note 12 and accompanying text.

²⁸ Assuming, for the sake of argument, that the Commission would collect \$35,000 in fees on trades in options on narrow-based security indexes in the absence of this exemption in fiscal year 2003, this amount would have represented only 0.0041% of the \$849 million in Section 31 fees targeted for

became effective retroactively to December 28, 2001, three additional national securities exchanges³⁰ were required adhere to the Index Calculation Rule to ascertain whether the indexes underlying their option products were narrow-based or broad-based, for purposes of paying Section 31 fees only on the correct index options. The Commission believes that one of the benefits of the rule amendments adopted today will be the elimination of the monitoring costs for these three exchanges.

In the adopting release for the Index Calculation Rule, the Commission—upon a suggestion made by one of the commenters—assumed that two full-time staff persons, one supervisory and the other clerical, would be required to apply the new rule. The Commission estimated the total annual cost of employing one clerical staff person would be approximately \$57,600, and that the total annual cost of employing a supervisory staff person would be approximately \$180,000. The Commission concluded, therefore, that the total cost to each affected exchange to engage the staff necessary to comply with the Index Calculation Rule would be \$237,600 annually.³¹ Further, the Commission anticipated that there would be systems implementation costs associated with the Index Calculation Rule. The Commission estimated that each affected exchange would incur a one-time system installation fee of \$300 and additional systems costs of \$25,800 annually.³²

The Commission believes that a Section 31 exemption for transactions in options on narrow-based security indexes will relieve three national securities exchanges of the compliance costs associated with the Index Calculation Rule. These exchanges will no longer incur the costs of monitoring indexes in a manner consistent with that rule for purposes of paying Section 31 fees, which costs were estimated by the Commission in the adopting release. Thus, the Commission believes that each of the three exchanges will avoid a one-time system installation fee of \$300; additional systems costs of \$25,800 annually; and staffing costs of \$237,600 annually.

A futures market would derive no corresponding benefit from a Section 31 exemption for futures on narrow-based security indexes because the futures market will still be required to monitor the indexes underlying its futures products, in a manner prescribed by the Index Calculation Rule, to ensure compliance with the appropriate regulatory framework.

2. Benefits of Relieving Collection Burdens

Furthermore, the Commission believes that three national securities exchanges will derive a small benefit from not having to collect and pay to the Commission Section 31 fees on options on narrow-based security indexes. However, the Commission believes that the collection and payment of Section 31 fees for options on narrow-based security indexes required only minor configurations to the existing systems of the exchanges, and that discontinuing such collection and payment will yield only very small cost savings to these exchanges.

The Commission does not believe that the futures markets will derive any corresponding benefit from a Section 31 exemption on transactions in futures on narrow-based security indexes. Currently, futures on narrow-based security indexes are not traded on any U.S. futures market. Furthermore, the Commission does not believe that these markets have current plans to trade such products in the near future. Therefore, because the futures markets would not in any case have had to devote resources to the collection and payment of Section 31 fees on transactions in futures on narrow-based security indexes, the Commission does not believe that the exemption granted today for such futures would create any benefits for the futures markets. The Commission believes, nevertheless, that such an exemption is necessary to establish a level playing field between options and futures on narrow-based security indexes at such time as these futures may be traded.

3. Benefits of Eliminating Section 31 Fees Payable By Market Participants Who Effect Transactions in Options or Futures on Narrow-based Security Indexes

One benefit of the amendments to Section 31 adopted today is that market participants who effect transactions in options or futures on narrow-based security indexes will not have to pay Section 31 fees on such transactions. However, as noted above, the Commission acknowledges that this benefit is offset by the increase in the

rate of Section 31 fees that must be paid by market participants on transactions in other, non-exempted securities.

VI. Statutory Authority

The amendments to Rule 31–1 under the Exchange Act are being adopted pursuant to 15 U.S.C. 78a *et seq.*, particularly Sections 23(a) and 31 of the Exchange Act.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of Rule Amendment

For the reasons set forth above, the Commission amends Part 240 of Chapter II, Title 17 of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, and 80b-11, unless otherwise noted.

* * * * *

2. Section 240.31–1 is amended by:

- a. Removing the phrase “other than narrow-based security indexes” in the first sentence of the Preliminary Note;
- b. Removing the period at the end of paragraph (a) and adding in its place a “;”;
- c. Removing the “and” at the end of paragraph (d);
- d. Removing the period at the end of paragraph (e) and adding in its place a “;”;
- e. Adding paragraphs (f) and (g) to read as follows:

§ 240.31–1 Securities transactions exempt from transaction fees.

* * * * *

(f) Sales of options on narrow-based security indexes; and

(g) Round turn transactions in futures on narrow-based security indexes.

Dated: January 31, 2002.

By the Commission.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 02–2764 Filed 2–1–02; 10:26 am]

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³⁰ Currently, there are five registered national securities exchanges that trade options. Only three of them—the American Stock Exchange, the Chicago Board Options Exchange, and the Philadelphia Stock Exchange—trade options on security indexes, some of which are narrow-based. Thus, a Section 31 exemption for options on narrow-based security indexes will affect only these three exchanges.

³¹ See 66 FR at 44510.

³² See *id.*